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ATTORNEYS FOR APPELLEE:

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**IN THE
COURT OF APPEALS OF INDIANA**

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No. 29A02-0708-CR-714

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March 31, 2008

KIRSCH, Judge

Following a jury trial, Miguel Gutierrez was convicted of two counts of rape,¹ each as a Class B felony. He appeals, raising only one issue for our review: whether the comments made by the State during closing argument constituted fundamental error.

We affirm.

FACTS AND PROCEDURAL HISTORY

On the evening of July 11, 2006, S.R. and the victim, K.R., stayed overnight with their friend K.P. at her home in Noblesville. Around midnight on the morning of July 12, the three girls, all around fourteen years of age, secretly left the house to visit with three male friends, who had driven to the neighborhood and parked in front of a white house nearby. The girls spent about an hour talking and listening to music in the boys' cars. During this time, an acquaintance from school, Elizar, came out of the white house and started to talk with the friends.

Eventually, the three boys left, and K.P. returned home. At Elizar's invitation, S.R. and K.R. joined a party at the white house where several young men, including Gutierrez, were talking and drinking. K.R. and S.R. sat in lawn chairs outside and drank Smirnoff Green Apple liquor, beer, and vodka with orange juice. After K.R. had consumed a significant amount of alcohol, Elizar told K.R. that he wanted to go for a walk. When K.R. indicated that she wanted to stay with S.R., Elizar grabbed her by the wrist and led her behind the house.

Once behind the house, Elizar pushed K.R. to the ground and pulled her pants down around her knees. K.R. was able to momentarily stand and pull up her pants. K.R. then fell,

¹ See IC 35-42-4-1(a)(1).

hit her head, and “blacked out” for a minute or so. *Tr.* at 427. When K.R. regained consciousness, three men, including Gutierrez, were standing over her. Gutierrez and another man then pulled K.R.’s pants down a second time. K.R. testified that, while Elizar held her shoulders down with his knees, Gutierrez and the unidentified man took turns raping her. *Id.* at 429-31. After the ordeal, K.R. returned to find S.R.

K.R. found S.R., still in her lawn chair, and insisted that the two leave. S.R., however, had consumed a significant amount of alcohol, was vomiting, and was unable to rise. K.R. attempted to help S.R. get up, but a man sitting next to S.R., Raphael, prevented them from leaving. After experiencing some dizziness, K.R. leaned against a pickup truck that was parked in the driveway. Gutierrez saw K.R., put her in the truck, pulled down her pants, and raped her again. An unknown man pulled Gutierrez off K.R., which allowed her to flee into the house.

K.R. tried, unsuccessfully, to lock herself in the bathroom. A few minutes later, Raphael entered the bathroom with his penis exposed. K.R. kicked him and ran out of the house. This time, she grabbed S.R. and helped her walk back to K.P.’s house. At K.P.’s home, S.R. told K.R. that Raphael had been trying to kiss her, and asked K.R. where she had gone. K.R. told S.R. what had happened, but said she was scared and did not want anyone else to know. The following day, S.R. told one or two people. After K.R.’s twenty-one year old sister learned of the rapes, she took K.R. to make a police report.²

Based on the report, Deputy Kija Ireland, of the Hamilton County Sheriff’s

Department, obtained a warrant to search the white house. While executing the warrant, Deputy Ireland took photographs of the fifteen persons present at the house, including Gutierrez. From a photo array, K.R. identified Gutierrez as the man who raped her both behind the white house and in the truck. Gutierrez was charged, and following trial, a jury found Gutierrez guilty of both counts of rape. He was sentenced to serve two concurrent ten-year sentences. He now appeals.

DISCUSSION AND DECISION

Gutierrez claims that it was fundamental error for the State to make certain statements during closing argument. Specifically, he contends that the Hamilton County Deputy Prosecutor committed prosecutorial misconduct by bolstering the credibility of the victim, questioning the credibility of the defendant, and inappropriately commenting on evidence that was not introduced at trial.

During closing argument, counsel for Gutierrez stated:

[Y]ou also had the opportunity to see and hear [K.R.'s] account of what happened and what she believed happened on July 12 of 2006. You were able to see her demeanor and get her testimony in court and also as she related it to Detective Ireland on July 13th. It is up to you to determine whether said testimony was credible.

Tr. at 550. Gutierrez's claim of fundamental error arises from the following statements, which were made by the State in its rebuttal argument.

[K.R.'s] demeanor was very respectful, not just to me, but to [Defendant's attorney], to the Court, to everyone. A little hunched over perhaps, a little protective in her body language, she didn't get defensive, she didn't get nasty,

² Although K.R. reported the crimes to the Noblesville Police Department, further investigation revealed that the crimes had been committed within the jurisdiction of the Hamilton County Sheriff's Department.

she was a bit emotional, but she kept it under control as best she could under the circumstances and she answered every question asked of her to the best of her ability. And not once did I see anything but sincerity in her behavior and her demeanor in this courtroom and her body language and [Defendant's attorney] asked you in voir dire, think about body language.

. . . .

I watched [Gutierrez] carefully after the opening statements and the voir dire. When we started this trial where he was very attentive, very respectful, looked down much of the time, listened carefully to what [the court interpreter] had to say as she translated [] the questions and answers and he did that throughout the testimony until [K.R.] took the stand. What did he do when [K.R.] took the stand? His whole body language changed. I did not see ladies and gentlemen, the righteous indignation of an unjustly accused man. I did not see a man who's being punished or potentially punished or being sought by the State to be punished, for what he described on the stand as an act of kindness. He was just trying to help her. She sat there, looked him in the eye and repeatedly referred to him as the Defendant and the person who raped her, not once on that stand did he look over at her. Not once ladies and gentlemen. Not once did he have the courtesy or the decency or the courage to look you in the eye. Oh his eyes were down then. Three times his attorney tried to ask him, did you commit this act. But he didn't understand the question. Did you rape [K.R.?] Ms. McCoy is a very competent interpreter or she wouldn't be here as an ancillary member of the court staff. Did he get a flat out no, I didn't? Absolutely not. And then he's asked again. Still do we get a flat out no I didn't. His attorney finally has to go, did you attack her in any way? No. Then we get a clear no, absolutely not. Third time it's asked and when I looked at [K.R.] and say to him did you have sex with [K.R.], no. Not a very convincing denial from where I sit. Not at all. Not much respect shown to this young girl who's had to come in here and relay this awful experience.

Id. at 556-57.

When faced with an allegation of prosecutorial misconduct, a defendant is required to object and request an admonishment. *Cowan v. State*, 783 N.E.2d 1270, 1277 (Ind. Ct. App. 2003), *trans. denied*. If, after an admonishment, the defendant is still not satisfied, the proper procedure is to move for a mistrial. *Id.* The failure to request an admonishment or move for a mistrial results in a waiver of the issue. *Id.*

Gutierrez acknowledges that his trial counsel failed to make contemporaneous objections to these statements. In an effort to avoid waiver, Gutierrez argues that the prosecutorial misconduct amounts to fundamental error.³ See *McKinney v. State*, 873 N.E.2d 630, 641-42 (Ind. Ct. App. 2007), *trans. denied* (citing *Booher v. State*, 773 N.E.2d 814, 817 (Ind. 2002) (waiver may be avoided if prosecutorial misconduct amounts to fundamental error)). In such a situation, the defendant must establish not only the grounds for prosecutorial misconduct, but also the additional grounds for fundamental error. *McKinney*, 873 N.E.2d at 642.

“In reviewing a properly preserved claim of prosecutorial misconduct, we would ‘determine (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected.’” *Booher*, 773 N.E.2d at 817 (quoting *Coleman v. State*, 750 N.E.2d 370, 374 (Ind. 2001)). “But for prosecutorial misconduct to constitute fundamental error, it must also ‘make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process [and] present an undeniable and substantial potential for harm.’” *McKinney*, 873 N.E.2d at 642 (quoting

³ Based on the same prosecutorial statements, Gutierrez also argues that, by making these comments, the prosecutor violated the Rules of Professional Conduct. As the Preamble to the Rules of Professional Conduct states, “Violation of a Rule should not itself give rise to a cause of action against a lawyer, nor should it create any presumption in such a case that a legal duty has been breached The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies The fact that a rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.” See also *Nationwide Ins. Co. v. Heck*, 873 N.E.2d 190, 195 (Ind. Ct. App. 2007). While the rules may be used as evidence of inappropriate behavior, a violation of this Code will not provide an additional remedy for Gutierrez.

Booher, 773 N.E.2d at 817). Stated differently, to prove fundamental error, “the prosecutor’s conduct must have subjected the defendant to grave peril and had a probable persuasive effect o[n] the decision.” *Rodriguez v. State*, 795 N.E.2d 1054, 1059 (Ind. Ct. App. 2003).

Gutierrez asserts that these statements caused him substantial harm and denied him fundamental due process. Noting that there was no physical evidence that linked him to the rape, Gutierrez argues that the jury’s decision had to hinge “almost entirely on [the jury’s] determination of whether K.R. or Gutierrez was more credible in their testimony regarding what happened” on that night in July 2006. *Appellant’s App.* at 14. He concludes, “It is highly probable [the prosecutor’s] comments persuaded the jury.” *Id.* at 15.

While it is evident that the jury believed K.R.’s version of the events and not Gutierrez’s version, there is no evidence that the jury’s decision was influenced by the prosecutor’s comments. The State’s evidence included the testimony of eight witnesses, including K.R., S.R., K.P., and Deputy Ireland. In her testimony, K.R. provided details regarding the events surrounding her two rapes on the night in question. *Tr.* at 430-31, 436-37. She also identified Gutierrez as the man who raped her both behind the house and in the truck. *Id.* K.R. and S.R. testified: Elizar invited them to the party at the white house; they drank beer and other alcoholic beverages; and Elizar, Raphael, and Gutierrez were three of the men at the party that night. *Tr.* at 333, 416. S.R. testified that, at one point in the evening, K.R. left with Elizar to go around the back of the house, and that a few minutes later “the man with the mohawk and the younger looking man walked away, towards [K.R. and Elizar.]” *Id.* at 340. S.R. identified Gutierrez as the man with the mohawk. *Id.* at 341. S.R. testified that K.R. was gone anywhere from fifteen to thirty minutes, during which time she

was left alone with Raphael. *Id.* at 342. She further testified that when K.R. returned, she was walking at a fast pace and, as she approached S.R., said, “we need to leave.” *Id.* at 343. The testimony from the State’s witnesses was consistent and supported K.R.’s version of the events that occurred on the night in question. The State presented overwhelming evidence that Gutierrez was guilty of two counts of rape. Gutierrez was not placed in grave peril by the prosecutor’s comments, nor was he denied fundamental due process.

Additionally, the prosecutor’s comments were made during closing argument and were not intended as evidence. Prior to the commencement of trial, the trial court instructed the jury:

When the evidence is completed, the attorneys will make final statements. These statements are not evidence but are given to assist you in evaluating the evidence. The attorneys are also permitted to argue, to characterize the evidence and to attempt to persuade you to a particular verdict. You may accept or reject those arguments as you see fit.

Tr. at 211; *Appellant’s App.* at 99. After both parties had given their closing arguments, the trial court again instructed:

The unsworn statements or comments of counsel on either side of this case should not be considered as evidence in the case. It is your duty to determine the facts from testimony and evidence admitted by the court and given in your presence and you should disregard any and all information you may derive from any other source.

Tr. at 563; *Appellant’s App.* at 109. In light of the overwhelming evidence against Gutierrez and the above admonishment given to the jury, we are confident that the prosecutor’s statements did not have a probable persuasive effect on the jury. *See Gamble v. State*, 831 N.E.2d 178, 185 (Ind. Ct. App. 2005), *trans. denied* (jury instructions served to lessen any persuasive effect alleged improper argument may have had).

Affirmed.

RILEY, J., and MAY, J., concur.